Supreme Court, U.S.
FILED
01 498 SEP 21 2001

No. 01-

IN THE

Supreme Court of the United States

MOHAVE VALLEY IRRIGATION AND DRAINAGE DISTRICT, a political subdivision of the State of Arizona,

Petitioner,

v.

GALE A. NORTON, Secretary of Interior,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHIRLEY S. SIMPSON
8914 South 141st Avenue
Goodyear, Arizona 85338
(623) 932-5683

TERRENCE S. LEEK
Counsel of Record
TERRENCE S. LEEK, P.C.
126 North Marina
Prescott, Arizona 86301
(928) 778-7700

Attorneys for Petitioner

168808

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

60 pp

QUESTION PRESENTED

This case really began in the early 1920's when representatives of seven western states met to allocate Colorado River water among themselves. The Colorado River Compact resulted. Congress also wrestled with concerns over development of the arid Southwest. The Boulder Canyon Project Act resulted. Congress delegated broad discretion to respondent to contract with users of water stored by the Project, but limited that discretion significantly with respect to contracts for delivery of water that was delivered to holders of present perfected rights. Arizona then called upon this Court to interpret the Act and to allocate Colorado River water among the states and their appropriators. Petitioner has no present perfected rights in Colorado River water. In 1968, under the broad authority granted respondent, respondent's predecessor entered into a water delivery contract with petitioner. This Court has provided an explicit roadmap in *Arizona v. California* and *Bryant v. Yellen* for deciding cases interpreting the Project Act. Nonetheless, the Ninth Circuit relied upon general reclamation law, not the Boulder Canyon Project Act or this Court's decisions interpreting the Act, to opine that petitioner's 1968 water delivery contract expressly included water that respondent was required to deliver to holders of present perfected rights.

The question presented is whether present perfected rights were included in petitioner's 1968 contract for permanent water service from the mainstream of the Colorado River because land that these rights benefit is located within the physical boundaries of petitioner's district.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	v
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Proper Application of the Boulder Canyon Project Act Is a Matter of Great Concern to the Southwest and to the Nation	8
II. *Bryant v. Yellen* Provides Explicit Guidelines by Which to Decide with Whom Respondent Is Authorized to Contract when Section 6 Present Perfected Rights Are Involved	14
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizona v. California, 373 U.S. 546 (1963) ..... *passim*

Arizona v. California, 376 U.S. 340 (1963) . 3, 6, 9, 10, 11

Arizona v. California, 439 U.S. 419 (1979) ...4, 10, 11, 12

Bryant v. Yellen, 447 U.S. 352 (1980) ..... *passim*

Kennewick Irr. Dist. v. United States, 880 F.2d 1018 (9th Cir. 1989) 14, 15

Klamath Water Users Pro. Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 2000) 15

Statutes:

5 U.S.C. §§ 701-706 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 5

43 U.S.C. § 617 4

43 U.S.C. § 617, *et seq.* 1

43 U.S.C. § 617d ..... *passim*

Cited Authorities

	Page
43 U.S.C. § 617e	*passim*
43 U.S.C. § 617g(a)	8
ARIZ. REV. STAT. § 45-1301	3, 9
ARIZ. REV. STAT. § 45-1311	1, 8, 9

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed April 11, 2001 ..... 1a

Appendix B — Order From Chambers And Judgment Of The United States District Court For The District Of Arizona Dated And Filed June 29, 1999 ..... 7a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Filed June 29, 2001 ..... 17a

Appendix D — Boulder Canyon Project Act, 43 U.S.C. §§ 617, 617d, 617e And 617g(a) 18a

Appendix E — Contract For Delivery Of Water Between United States Department Of The Interior And The State Of Arizona (ARIZ. REV. STAT. § 45-1301) 22a

Appendix F — Final Decision Of The United States Department Of The Interior Dated April 3, 1996 ..... 34a

Petitioner respectfully petitions for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (per Schroeder, C.J., joined by J. Wallace and Tallman, JJ.) affirming (Appendix ("Pet. App.") 1a-6a) is published at 244 F.3d 1164. The district court's order and judgment (per Sedwick, D.J.) granting respondent's summary judgment motion and denying petitioner's cross motion (Pet. App. 7a-16a), the court of appeals' order denying rehearing and rehearing en banc (*id.* 17a) and the final decision by the Department of the Interior (*id.* 34a-37a), are not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on April 11, 2001, and denied rehearing and rehearing en banc on June 29, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Boulder Canyon Project Act, 43 U.S.C. § 617, *et seq.*, pertinent to this petition are reprinted in the Appendix at 18a. The provisions of the Colorado River Compact, ARIZ. REV. STAT. § 45-1311, pertinent to this petition provide:

ARTICLE I

> The major purposes of this compact are to provide for the equitable division and

apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

. . . .

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III. All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

The water delivery contract between respondent and the State of Arizona, *id.* § 45-1301, is reprinted in the Appendix at 22a.

STATEMENT OF THE CASE

This case is a dispute between a state irrigation district and the Secretary of Interior about a contract for the delivery of Colorado River water. Petitioner says the contract is for storage water under section 5[1] of the Boulder Canyon Project Act, over which respondent has broad contracting authority. Respondent says the contract includes water respondent is required to deliver to holders of present perfected rights under section 6[2] of the Act. Respondent's justification for her position is that lands having decreed present perfected rights are physically located within the district boundaries, even though petitioner has no decreed present perfected rights[3] to

---

1. Boulder Canyon Project Act, ch. 42, § 5, 45 Stat. 1060. In case law this provision is referred to simply as "section 5." This petition will also use this designation.

2. Boulder Canyon Project Act, ch. 42, § 6, 45 Stat. 1061. In case law this provision is referred to simply as "section 6." This petition will also use this designation.

3. "Present perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act; and, in addition, shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use. *Arizona v. California*, 376 U.S. 340, 341 (1963).

such water. The district court and the Ninth Circuit agree with respondent. In its decision, the court of appeals has applied general reclamation law, not the Boulder Canyon Project Act, the Colorado River Compact, or *Arizona v. California*, 373 U.S. 546 (1963) and its 1979 supplemental decree to justify its decision. Thus, the decision ignores both the significance to the nation and the critical importance to the Southwest of how respondent distributes Colorado River water. Moreover, the court of appeals' decision is in direct conflict with this Court's decisions in *Bryant v. Yellen*, 447 U.S. 352 (1980), and *Arizona v. California*, 439 U.S. 419 (1979).

1. Petitioner, a political subdivision of the State of Arizona, is an irrigation and drainage district. It is situated in Mohave County, Arizona, along the Colorado River. The landholders located within the district draw water from wells that are connected hydraulically to the mainstream of the Colorado River. Petitioner does not now have and never has had present perfected rights in Colorado River water, *see Arizona v. California*, 439 U.S. 419, 423-28 (1979); nor does it hold such rights in trust on behalf of the landowners located within the district, *cf. Bryant v. Yellen*, 447 U.S. 352, 371 (1980) (irrigation district was trustee under state law for owners of present perfected rights whose lands were located within the district; the district had decreed rights for such lands).

2. Respondent is the Secretary of Interior. The Boulder Canyon Project Act, enacted in 1928, authorizes respondent to store Colorado River water in the reservoir behind Hoover Dam (formerly Boulder Dam), 43 U.S.C. § 617, and to contract for the delivery of such water at points on the river for irrigation and domestic uses, *id.* § 617d (section 5); *accord Arizona v. California*, 373 U.S. 546, 561 (1963).

These contracts are for permanent service. *Id.* The Project Act became effective on June 25, 1929. 373 U.S. at 561.

In November 1968, Secretary of Interior Stewart L. Udall, an Arizonan, personally executed a water delivery contract with petitioner (the "1968 Contract"). The interpretation of the 1968 Contract is at the center of the dispute between petitioner and respondent. Respondent insists that, in the contract water allotment of petitioner's 1968 Contract, water represented by present perfected rights, 43 U.S.C. § 617e (section 6), is included and always has been included.

3. In December 1995, petitioner sued respondent in the district court for unilaterally reducing petitioner's water allotment in derogation of the 1968 Contract. Petitioner invoked the jurisdiction of the district court under 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706. Respondent and petitioner filed cross-motions for summary judgment that same month. In March 1998, the case was assigned to a new judge. The parties filed supplemental briefs in August 1998. In May 1999 the case was reassigned to Judge Sedwick, a district judge in Anchorage, Alaska. On June 29, 1999, Judge Sedwick entered his Order from Chambers and the Clerk filed the Order and Judgment granting respondent's summary judgment motion and dismissing petitioner's complaint. Pet. App. 7a-16a.

The district court noted that respondent was obligated by *Arizona v. California* and section 5 of the Boulder Canyon Project Act to contract separately with landowners in petitioner's district who hold present perfected rights. *Id.* 9a & n.5. The court was wrong about section 5 governing contracts with holders of present perfected rights.

In section 5, Congress gave respondent broad discretion to choose with whom and to choose upon what terms to contract with users of storage water. In section 6, however, Congress unequivocally limited respondent's discretion. Section 6 contracts must conform to rights perfected under state law prior the effective date of the Boulder Canyon Project Act and decreed by this Court. *Arizona v. California*, 373 U.S. 546, 580-81 (1963).

Present perfected rights are never mentioned in the 1968 Contract. Not understanding the significance of the difference between section 5 contracts, like petitioner's 1968 Contract, and section 6 contracts that respondent was required to make with holders of present perfected rights, the district court ruled for respondent, holding that parts of two provisions of the 1968 Contract, Pet. App. 11a-13a, expressly provided that present perfected rights were included within water allocated to petitioner under section 5. Pet. App. 11a, 15a-16a.

4. On petitioner's appeal the Ninth Circuit affirmed. The opinion is exceptional for its reliance on the wrong federal law and its exacerbation of the lower court's lack of understanding of the significant difference between section 5 contracts for storage water and section 6 contracts with holders of present perfected rights.

In passing, the court of appeals cited the 1964 decree in *Arizona v. California*, 376 U.S. 340, 341, Pet. App. 2a-3a, for the definition of present perfected rights, and cited *Bryant v. Yellen*, 447 U.S. 352, 364-64 (1980), for recognizing that present perfected rights constitute a limitation on respondent's power to distribute water from the Colorado River, Pet. App. 3a. The court of appeals relied entirely,

however, on Ninth Circuit cases that are not a part of the law governing distribution of Colorado River water (the "Law of the River"), Pet. App. 4a, and ignored the Boulder Canyon Project Act. Congress intended the Project Act to govern the distribution of Colorado River water among the lower basin states and also to govern the distribution of such water to contract water users pursuant to section 5 of the Act, and to holders of present perfected rights pursuant to section 6 of the Act. *See Arizona v. California*, 373 U.S. 546, 575-90 (1963).

5. The court of appeals denied petitioner's request for a panel rehearing and rehearing en banc. Pet. App. 17a. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons.

First, the Ninth Circuit's opinion relies on general reclamation law when, for 70 years, discussions, compacts, federal legislation and ongoing litigation in this Court have resulted in carefully and arduously crafted law,[4] that protects the interests of Colorado River water users in the beneficial use of mainstream water in arid desert states. The nation, as well as the Southwest, has a significant interest in the distribution of Colorado River water as Congress has directed.

---

4. The "Law of the River," includes the Colorado River Compact, the Boulder Canyon Project Act, *Arizona v. California*, 373 U.S. 546 (1963), and its supplemental decrees, and *Bryant v. Yellen*, 447 U.S. 352 (1980).

Second, the Ninth Circuit has decided this important federal question in a way that conflicts with relevant decisions of this Court interpreting the Boulder Canyon Project Act. The court of appeals decided this question without any consideration of the Law of the River. No other circuit court hears and decides these cases so that, absent review by this Court, the Ninth Circuit may go unchecked in its propensity to apply general reclamation law without reference to the Act.

I. The Proper Application of the Boulder Canyon Project Act Is a Matter of Great Concern to the Southwest and to the Nation

The history of the Act and the controversy surrounding the Act illustrate its importance to the Southwest and the nation. The Boulder Canyon Project Act requires satisfaction of present perfected rights, *id.* § 617e; *accord Arizona v. California*, 373 U.S. 546, 566 (1963). Section 6 of the Act is a clear and unequivocal limitation on respondent's power. 373 U.S. at 581, 584.

The Project Act further provides that both respondent and petitioner are subject to and controlled by the Colorado River Compact and that all water delivery contracts shall so provide. 43 U.S.C. § 617g(a). On November 24, 1922, representatives of the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming executed the Colorado River Compact. ARIZ. REV. STAT. § 45-1311. Article VIII provides that "[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact," and provides further that once adequate storage capacity was attained for the benefit of the lower basin states, claims of present perfected rights by lower basin

appropriators against appropriators or users of water in the upper basin attached and could be satisfied from Colorado River water. *Id.* There could not be a plainer statement of the importance of present perfected rights to the compacting states, or a more significant limitation on the contracting discretion of respondent.

In February 1944 the Secretary of Interior and the State of Arizona entered into a water delivery contract pursuant to Section 5 of the Project Act, *see* 373 U.S. at 591-92, for the delivery of water to users in Arizona. ARIZ. REV. STAT. § 45-1301. This contract reiterates that present perfected rights are unimpaired. *Id.* ¶ 7(l).

In 1952 the State of Arizona invoked the original jurisdiction of this Court by filing a complaint against the State of California and seven of its public agencies. Later, Nevada, New Mexico, Utah, and the United States were added as parties. The basic controversy was over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries. *See Arizona v. California*, 373 U.S. 546, 550 (1963). This Court stressed the gravity of the Southwest's water problems in an arid land, *id.* at 552, and quoted the Fall-Davis Report to Congress, a precursor to the enactment of the Boulder Canyon Project Act, to the effect that flood control and development of the resources of the Colorado River were peculiarly national problems, *id.* at 554. The Court held that Congress, in the Boulder Canyon Project Act, apportioned the mainstream of the Colorado River among Arizona, California and Nevada. *Id.* at 564-65.

In 1964, this Court entered its Decree carrying into effect the 1963 opinion. *Arizona v. California*, 376 U.S. 340.

The Court also ordered Arizona, and other states, to furnish the Court and the Secretary of Interior with lists of claimed present perfected rights and their claimed priority dates in waters of the mainstream. *Id.* at 351-52. Arizona submitted its list by October 1966.

By June 1968, Roy D. Gear, then Regional Supervisor of the Water and Land Operations Division of the Bureau of Reclamation, was part of a fact-finding committee to review present perfected rights claims within the lower basin. Arizona's list included the claims of the Yuma Valley Project, Valley Division, and Unit B, the North Gila Valley Irrigation District, and Cibola Valley Irrigation District, as well as some Arizona cities, towns and state agencies. It also included miscellaneous claims of individuals, including the Hurschlers, whose land is situated within the physical boundaries of petitioner's district and whose contract with respondent is mentioned in the court of appeals' opinion. Arizona did not submit a claim for petitioner. Respondent's predecessors knew, through Mr. Gear, from 1968 forward, what claims for present perfected rights the State of Arizona was asking this Court to decree to appropriators within Arizona. Respondent's predecessors were active participants in advising this Court as to what present perfected rights existed in the State of Arizona, including those situated within the current boundaries of petitioner's district.

In 1979, this Court decreed present perfected rights to those entitled to them under state law and Section 6 of the Project Act. *Arizona v. California*, 439 U.S. 419. The Court decreed present perfected rights within Arizona to the Valley Division, Yuma Project, the Yuma Auxiliary Project, Unit B, the North Gila Valley Unit, Yuma Mesa Division, Gila Project, and to the City of Parker and City of Yuma.

Id. at 423-24, 427. It also decreed present perfected rights to private individuals owning land within the external boundaries of petitioner, *id.* at 424-28, including the Hurschlers, *id.* at 425. The Court was not asked to decree any present perfected rights to petitioner and did not do so. *Id.* at 423-28. This Court, in *Arizona v. California*, set out exactly what mainstream water respondent must deliver to specific holders of present perfected rights for use on specifically described land. Respondent has no discretion under the Boulder Canyon Act, the Colorado River Compact and *Arizona v. California*, but to deliver that water to the holder as decreed and to no other person or entity.

In November 1968, the parties executed the Section 5 water delivery contract. The 1968 Contract, by its own terms, was made pursuant to the Boulder Canyon Project Act, the Colorado River Compact, the 1944 Contract between the United States and the State of Arizona, the Court's opinion in *Arizona v. California*, 373 U.S. 546 (1963), and the decree entered in 1964, 376 U.S. 340. The 1968 Contract contains a provision for a ten-year review of the existing and potential water uses and needs of petitioner. Under this provision, respondent may reduce the maximum number of acre feet of water to be delivered annually to petitioner under the contract, after notice to petitioner and an opportunity to be heard. The 1968 Contract also contains a provision imposing the 160-acre limitation on deliveries of contract water. These provisions are appropriate for Section 5 contracts, but not for section 6 contracts.

In March 1984, respondent's predecessor entered into a water delivery contract entitled, "Contract for Delivery of Colorado River Water to Holders of Miscellaneous Present Perfected Rights." Roy D. Gear, by then Regional Director

of the Lower Colorado Region of the Bureau of Reclamation, executed this contract on behalf of respondent's predecessor. The contract recited that the Hurschlers were the holders "of a miscellaneous present perfected right decreed and listed in the Supplemental Decree of January 9, 1979," *see Arizona v. California*, 439 U.S. 419, 425. The Hurschler contract does not contain a provision imposing the 160-acre limitation or a provision for reducing the contract water allotment.

In January 1989, the Regional Director for the Lower Colorado Region of the Bureau of Reclamation advised petitioner "that a review of the Mohave Valley Irrigation and Drainage District's (District) water service contract dated November 14, 1968, has been completed, and it has been determined that no reduction in the District's Colorado River water allocation will be required (see Subarticle 10(h))." Thus, after execution of the Hurschlers' section 6 water contract for delivery of mainstream water within the physical boundaries of petitioner's district, the water allocation in petitioner's section 5 contract remained unchanged.

The dispute between petitioner and respondent began in May 1993, when, responding to a request from the Regional Director of the Lower Colorado Region of the Bureau of Reclamation, the Field Solicitor from the Phoenix Field Office of Interior's Office of the Solicitor opined that respondent was free to reduce water deliveries under petitioner's 1968 Contract commensurate with water contracted for by owners of land physically within the boundaries of petitioner's district that had present perfected rights. He came to this opinion despite his conclusion that the 1968 Contract

> cannot be construed as granting to either the District or a PPR holder within the District, any PPR water, or, in any other way acting to satisfy PPRs as required by Section 6 of the Boulder Canyon Act. The contract is what it purports to be, i.e., a contract for the delivery of stored water executed under authority of Section 5 of the Boulder Canyon Project Act.

Petitioner agrees entirely with this latter conclusion of the Field Solicitor.

Next, in June 1994, some years before the next ten-year review of the 1968 Contract was due, respondent received a determination letter from the Acting Regional Director for Lower Colorado Region of the Bureau of Reclamation. This letter advised petitioner that Colorado River water used on land located within the physical boundaries of petitioner's district, by holders of present perfected rights pursuant to section 6 of the Project Act, would be charged against petitioner's water allocation in the 1968 Contract.

Petitioner appealed the Lower Colorado Region's determination letter in August 1994. By letter of April 3, 1996, the Commissioner of the Bureau of Reclamation, in a final decision of the Department of Interior, found that the water represented by present perfect rights for land that is located within the boundaries of petitioner's district was subsumed into petitioner's 1968 Contract. Are we now to believe that respondent's predecessors did not understand the significant difference between section 5 water and section 6 water when drafting water contracts, even though the Field Solicitor plainly concluded that the 1968 Contract was a section 5 contract for delivery of storage water?

II. *Bryant v. Yellen* Provides Explicit Guidelines by Which to Decide with Whom Respondent Is Authorized to Contract when Section 6 Present Perfected Rights Are Involved

Apparently, the guidance of this Court in *Arizona v. California*, 373 U.S. 546 (1963), regarding the importance of preserving the rights of holders of present perfected rights was not sufficient to guide the Ninth Circuit. In 1980, this Court reversed the court of appeals in *Bryant v. Yellen*, 447 U.S. 352, 379. The court of appeals had sustained the government's position that the 160-acre limitation contained in general reclamation law applied to all privately owned land in the Imperial Irrigation District whether or not the District had been adjudicated to have a perfected water right as of 1929. *Id.* at 355-56. Just as in petitioner's case, respondent's predecessor repudiated the government's long-term understanding of the Imperial Irrigation District's water delivery contract and the Ninth Circuit applied general reclamation law and not the Boulder Canyon Project Act. *Id.* In *Bryant*, the Court recited, again, the development of the Law of the River. *Id.* at 355-60. This Court found that "the Court of Appeals failed to take adequate account of § 6 of the Project Act and its implementation in our opinion and decrees filed in the *Arizona v. California* litigation." *Id.* at 370.

The Ninth Circuit opinion in this case relies on *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989). *Kennewick* involved the discretionary-function exception to the Federal Tort Claims Act. *Id.* ¶ 1. Borrowing a quote from *Bryant*, the *Kennewick* court was "not dealing with perfected rights to water that the project there involved would furnish, nor with a Project Act that specifically required present perfected rights to be satisfied. Here we are

dealing with perfected rights protected by the Project Act." *Bryant v. Yellen*, 447 U.S. at 372.

There is no rationale for the Ninth Circuit to rely on *Kennewick* to impute to respondent discretion to include water decreed to holders of present perfected rights in a section 5 water delivery contract merely because petitioner is an irrigation district and the land with decreed rights is physically located within petitioner's district. Moreover, there is nothing in the Law of the River that gives respondent such discretion.

The Ninth Circuit also relies on *Klamath Water Users Pro. Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000). The contract at issue in *Klamath*, was "entered into pursuant to the Reclamation Act and 'acts of Congress relating to the preservation and development of fish and wildlife resources,' " *id.* at ¶ 4, not pursuant to the Law of the River. Again, nothing in *Klamath* provides a rationale for the court of appeals' decision. The court of appeals' justification for relying on these cases is that it "has consistently applied federal law to interpret reclamation contracts." Pet. App. at 4a. If the Ninth Circuit continues unchecked by this Court to apply general reclamation law to the interpretation of water delivery contracts made pursuant to the Boulder Canyon Project Act, respondent will be encouraged to ignore the Section 6 limitation on her contracting power when contracting for delivery of water held by holders of present perfected rights. Under the Law of the River, respondent cannot deliver such water to any user of her choice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHIRLEY S. SIMPSON
8914 South 141st Avenue
Goodyear, Arizona 85338
(623) 932-5683

TERRENCE S. LEEK
Counsel of Record
TERRENCE S. LEEK, P.C.
126 North Marina
Prescott, Arizona 86301
(928) 778-7700

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED APRIL 11, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-16927
D.C. No. CV-95-02640-JWS

MOHAVE VALLEY IRRIGATION & DRAINAGE DISTRICT,

Plaintiff-Appellant,

v.

GALE A. NORTON, SECRETARY OF INTERIOR,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the District of Arizona
John W. Sedwick, District Judge, Presiding

Argued and Submitted
February 15, 2001 — San Francisco, California

Filed April 11, 2001

Appendix A

Before: Mary M. Schroeder, Chief Judge,
J. Clifford Wallace, and Richard C. Tallman, Circuit Judges.

Opinion by Chief Judge Schroeder

* * *

OPINION

SCHROEDER, Chief Judge:

The Mohave Valley Irrigation and Drainage District ("District"), located in western Arizona, appeals the district court's grant of summary judgment to Gale Norton, in her capacity as Secretary of the Interior ("Interior"). The District alleges that Interior breached a 1968 contract entitling the District to 41,000 acre feet of water annually from the Colorado River system. The District and Interior differ on whether that entitlement encompasses water delivered to landowners in the District who hold present perfected rights ("PPRs") to Colorado River water.

The Supreme Court has defined PPRs as those rights to water from the Colorado River system existing as of June 25, 1929, acquired under state law and having been put to beneficial use, as well as all rights created under federal law. It defined the scope of such rights as follows:

> [Any water right] acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or

> to definite municipal or industrial works . . . [as well as] rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use.

Arizona v. California, 376 U.S. 340, 341 (1964). Pursuant to 43 U.S.C. § 617e, the Department of Interior is obligated to use water from the Colorado River system to supply holders of present perfected rights. *See Bryant v. Yellen*, 447 U.S. 352, 364-65 (1980) (recognizing that present perfected rights constitute a limitation on Interior's power to distribute water from the Colorado River).

The District entered into a contract in 1968 to establish its limited entitlement to water from the lower Colorado River, its related reclamation projects, and wells fed by the River's groundwater and Interior's projects. The contract establishes the District's annual allotment of water (currently set at 41,000 acre feet) and provides specific procedures through which the entitlement can be adjusted every ten years. The contract does not explicitly mention the impact of water deliveries to holders of PPRs located within the District's boundaries.

Interior maintains it fulfills its responsibility if it calculates the District's allotment by subtracting water provided to holders of PPRs located within the District from the amount fixed by the contract. The district court agreed with Interior. It found that the allotment of water in the contract encompasses all the water delivered to the District, even if some of that water goes to landowners who hold

PPRs. The District appeals, contending that the contract is ambiguous and that a trial is necessary to establish its entitlement to the full water allotment under the contract, in addition to the water delivered to holders of PPRs.

Federal law governs the interpretation of contracts where the United States is a party. *O'Neill v. United States*, 50 F.3d 677, 682 (9th Cir. 1995). This Court has consistently applied federal law to interpret reclamation contracts. *See, e.g.*, *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999); *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989). We interpret the 1968 contract between the District and Interior by considering whether a reasonable person would find the contract's terms to be ambiguous. *Castaneda v. Dura-Vent Corp.*, 648 F.2d 612, 619 (9th Cir. 1981). On its face, the contract language supports Interior's interpretation. The contract broadly defines the District as follows:

> that area of land in Mohave County, formally included within the Mohave Valley Irrigation and Drainage District . . . [except] those lands that are within the external boundaries of the District but which have been excluded from the District pursuant to resolution or any order of a court of proper jurisdiction . . . .

There is no judicial decision excluding the areas belonging to holders of PPRs from the scope of the definition of water delivered to the District, nor does the contract language itself make any exceptions for holders of PPRs. Moreover, "water delivered" is defined in the contract as:

> all water pumped by the District or by any other person, firm, or Corporation, from wells located within or outside the District for use within the District or from wells located within the District for use outside the District . . .

The breadth of the definitions of "water delivered" and "District" lends support to the view that the contract's allocation of water makes no exception for water delivered to PPR holders.

The District makes much of the fact that the contract does not mention PPRs, but the omission does not help its cause. PPRs had already been recognized by the Supreme Court well before the parties entered into the contract. *See Arizona*, 376 U.S. at 341. If the parties intended to exclude water received by holders of PPRs, the contract would not have defined the waters included in the allocation so expansively.

The District contends there is extrinsic evidence that supports its position. We look to the Uniform Commercial Code ("UCC") to decide whether we can consider extrinsic evidence to determine whether a contract, clear on its face, is actually ambiguous. *O'Neill*, 50 F.3d at 683-84. According to the UCC, to determine whether a contract's terms are ambiguous, courts may only consider evidence of course of dealing, trade usage, or course of performance. UCC § 2-202.

The District first points to Interior's handling of the first individual contract with a PPR holder (the Hurschler family) located within the District's territory. We assume, without

deciding, that this evidence constitutes trade usage evidence admissible under the UCC to determine whether there exists a latent ambiguity in the contract. After the Hurschler contract entered into force, Interior did not reduce or change the District's allotment of water. It was not until nine years later that Interior decided, on the advice of its field solicitor, to reduce the District's water allotment in proportion to delivery of water to PPR holders. Yet the Hurschler contract contains a clause providing that it was made "with the express understanding that . . . the Colorado River water entitlement of [the District] shall not be increased in any way by virtue of this contract." Interior could not reasonably have believed that the District's contractual entitlement increased by virtue of the recognition of the Hurschlers' PPRs. Thus, this evidence does not render the contract between the District and Interior ambiguous.

The District also presents the minutes of its Board of Directors meeting in April 1969 to make the case that the contract is ambiguous. The minutes suggest that the District's Chairman thought at that time that water delivered to PPR holders would be added, not subtracted, from the District's allotment. This, too, is unhelpful. The minutes of the District's Board of Directors meeting do not represent evidence of any course of mutual conduct, trade usage, or performance and, thus, may not be considered. *See* UCC § 2-202. In the absence of such evidence, the contract is not ambiguous.

AFFIRMED.

APPENDIX B — ORDER FROM CHAMBERS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED AND FILED JUNE 29, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV-95-2640-PCT-EHC (JWS)

MOHAVE VALLEY IRRIGATION AND DRAINAGE DISTRICT, a political subdivision of the State of Arizona,

Plaintiff,

vs.

HONORABLE BRUCE E. BABBITT, Secretary of the United States Department of the Interior,

Defendant.

ORDER FROM CHAMBERS

[Re: Motion for Summary Judgment and Cross-Motion for Summary Judgment Dockets 22, 26, and 32]

I. MOTIONS PRESENTED

At docket 22, defendant Bruce E. Babbitt, Secretary of the United States Department of the Interior ("Babbitt") moves for summary judgment. The motion is opposed by

plaintiff Mohave Valley Irrigation and Drainage District ("Mohave Valley") at docket 32.[1] Mohave Valley also cross-moves for summary judgment at docket 26. Oral argument was not requested pursuant to Local Rule 1.10(f)(1) before this case was re-assigned. Oral argument would not assist the court.

II. BACKGROUND

This is a water-rights case. Mohave Valley is an Arizona irrigation district. Mohave Valley executed a contract with the United States in 1968 by which the United States obligated itself to supply Mohave Valley with a maximum of 51,000 acre feet per year of Colorado River water.[2] Mohave Valley's entitlement was fixed at 41,000 acre feet per year in 1979. Certain landowners in Mohave Valley's area possess what is known as "present perfected rights." These rights have been defined by the United States Supreme Court:

---

1. Mohave Valley's response at docket 32 is being tracked as a separate "motion" under the court's docketing scheme. However, it is not a "motion," but as noted an opposition to Babbit's motion for summary judgment.

2. Babbitt's memorandum of law at docket 23 sets forth the historical and legal background preceding the 1968 contract's execution, including the 1922 Colorado River Compact which allocated water among all Upper and Lower Basin States drawing water from the Colorado River, the Boulder Canyon Project Act of 1928 which allocated water among the Lower Basin States, including Arizona, and subsequent legal developments. *See* Babbitt's Memorandum of Law, docket 23 at 2-5. Rather than restate Babbit's concise and helpful summary, the court incorporates it within this order by reference for brevity's sake.

> (G) 'Perfected right' means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;
>
> (H) 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;[3]

There are between 5,800 acre feet and 5,940 acre feet of present perfected rights in the concerned district owned by a total of seven landowners. Under the Boulder Canyon Project Act of 1928, 43 U.S.C. §§ 617-617v ("Act"), the United States must satisfy present perfected rights when allocating water from the Colorado River.[4] The United States Bureau of Reclamation is obligated to separately contract with landowners in Mohave Valley's district who hold present perfected rights.[5]

---

3. *Arizona v. California*, 376 U.S. 340, 341, 84 S. Ct. 755, 756 (1964).

4. 43 U.S.C. § 617e; *see also Bryant v. Yellen*, 447 U.S. 352, 369-71, 100 S. Ct. 2232, 2242-43 (1980) (for discussion).

5. *See, e.g., Arizona v. California*, 376 U.S. 340, 342, 84 S. Ct. 755, 756-57 (1964); *Arizona v. California*, 373 U.S. 546, 584, 83 S. Ct. 1468, 1490 (1963); 43 U.S.C. § 617d.

The United States contends that the amount of water thus allocated to these landowners is included within the amount of water allocated to Mohave Valley. Mohave Valley, in contrast, argues that the 1968 contract does not allow for such an inclusion which essentially subtracts water it is due under contract. Other facts as relevant are stated below.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.[6] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[7] Once the moving party has met this burden, the non-moving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[8] All evidence presented by the non-movant must be believed for purposes of summary judgment and all justifiable inferences must be drawn in favor of the non-movant.[9] However, the non-moving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute

---

6. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

7. *Id.* at 323-325.

8. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-9 (1986).

9. *Id.* at 255.

to require a fact-finder to resolve the parties' differing versions of the truth at trial.[10]

IV. DISCUSSION

Babbitt argues that the 1968 contract expressly provides that present perfected rights shall be included within water allocated to Mohave Valley. To reach this conclusion, Babbitt relies upon two provisions in the 1968 contract, Article 10(a)(i) and Article 9(h). Article 10(a)(i) provides:

> To provide water exclusively for irrigation and domestic use *by and within the District*, the United States will, from storage available in Lake Mead, deliver to the District at such point or points in the Colorado River as may be mutually agreed to in writing by the parties hereto and within the limitations as to the rate of delivery hereinafter specified, such quantities of surface water as may be ordered by the District and as may be necessary to supply the District with a total quantity, *including all other waters diverted directly from the surface flow of the Colorado River or withdrawn by underground pumping from such wells and for such uses as are described in Article 9(h) above*, not in excess of 51,000 acre feet per calendar year minus, however, such quantity or quantities as may be withdrawn by reason of reductions made by the United States pursuant to the provisions of Articles 10(g), (h), and (i).[11]

---

10. *Id.* at 248-9.

11. Contract, Article 10(a)(i) at 6 (emphasis added).

Appendix B

The contract defines "District" as a geographic area encompassing "that area of land in Mohave County, formally included within the MOHAVE VALLEY IRRIGATION AND DRAINAGE DISTRICT . . . ."[12] Article 10(a)(i) therefore obligates the United States to provide water "for irrigation and domestic use by and within the District" including "such quantities . . . as may be necessary to supply the District with a total quantity" which includes "all other waters diverted directly from the surface flow of the Colorado River or withdrawn by underground pumping from such wells and for such uses as are described in Article 9(h)." Article 9(h) provides:

> "Water diverted by the District" and "water delivered to District" means Colorado River water available for diversion by the District directly from the surface flow of the river, sometimes hereafter referred to as "surface water" and, for water accounting and payment purposes pursuant to the provisions of the Contract, particularly Articles 12, 13, and 14 hereof, and for the purposes of Article 21 herein concerning excess lands, *shall be deemed to include all water pumped by the District or by any other person, firm, or Corporation, from wells located within or outside the District for use within the District or from wells located within the District for use outside the District*, sometimes hereafter referred to as "pumped water." All pumped water shall be deemed to be "water drawn from the mainstream

12. Contract, Article 10(g) at 5.

> of the Colorado River by underground pumping" pursuant to Article I(c) of the Decree of the Supreme Court referred to in Article 5 hereof. *Pumped water drawn from lands within the external boundary of the District that are not part of the District, as defined in Paragraph (g) above, shall not be charged against the 51,000 acre feet allocated to the District under this Contract.*[13]

Babbit contends that these two articles establish that Mohave Valley's entitlement includes water allocated to present perfected rights. The court agrees. By its own terms, the contract obligated the United States to provide water for use "by and within the District . . . including all other waters diverted directly from the surface flow of the Colorado River or withdrawn from the mainstream of the Colorado River by underground pumping from such wells and for such uses as are described in Article 9(h)."[14] The contract specifies that *all* pumped water is considered to be water withdrawn from the mainstream of the Colorado River by underground pumping.[15] Article 9(h) contemplates "such uses" as the delivery to excess lands that amount of water pumped "by the District or by any other person, firm, or Corporation, from wells located within or outside the District for use within the District or from wells located within the District for use outside the District."[16]

---

13. Contract, Article 9(h) at 5-6 (emphasis added).

14. Contract, Article 10(a)(i) at 6.

15. Contract, Article 9(h) at 5.

16. *Id.*

Appendix B

The contract includes an exception. Article 9(h) provides that pumped water "drawn from lands within the external boundary of the District that are not part of the District, as defined in Paragraph (g) above, shall not be charged against the 51,000 acre feet [subsequently amended to 41,000 acre feet in 1979] allocated to the District under this Contract."[17] Babbitt notes, as an example of such lands, the Fort Mohave Indian Tribe reservation.[18] This exception essentially recognizes that the contract provides that water allocated to lands within the District — as "District" is defined in Article 9(g) — is included within the total amount of water allocated to Mohave Valley. If this were not the case, then the exception would not be necessary. Mohave Valley does not argue that this exception is applicable, and the court is aware of no evidence that would suggest that the exception applies in this case. In short the 1968 contract may not be a model of clarity, but its terms expressly provide that the total quantity of water the United States is obligated to allocate to Mohave Valley includes all other water allocated to the District which by operation of law would include water allocated to present perfected rights.

Instead of addressing the contract's terms and provisions, Mohave Valley launches a barrage of arguments which, in this court's opinion, miss the mark. Mohave Valley contends that allocating water for present perfected rights violates administrative law, that Babbitt is attempting to unilaterally amend the contract, that the contract is ambiguous, that the

---

17. Contract, Article 9(h) at 6.

18. Response to Plaintiff's Motion for Summary Judgment, docket 34 at 4 n.4.

contract must be strictly construed against the United States, that the decision to include water allocated for present perfected rights within the total amount of water allocated to Mohave Valley represents an unconscionable decision, that the contract should be reformed to accommodate the parties' purported original intent, and a number of other arguments too numerous to recite. The court has considered Mohave Valley's arguments and finds them unpersuasive principally for those reasons stated in Babbitt's response at docket 34.

V. CONCLUSION

For the foregoing reasons, the United States' motion for summary judgment at docket 22 is **GRANTED**, and Mohave Valley's motions at docket 26 is **DENIED**. As an administrative matter, the Clerk of Court will also reflect that Mohave Valley's "motion" at docket 32 has also been **DENIED** in order that this "motion" may be cleared from the court's docket.[19]

DATED at Anchorage, Alaska this 25th day of June, 1999.

s/ John W. Sedwick
JOHN W. SEDWICK
UNITED STATES DISTRICT
JUDGE

---

19. *See* note 1, *supra*.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV-95-2640-PCT-EHC (JWS)

MOHAVE VALLEY IRRIGATION
AND DRAINAGE DISTRICT,

Plaintiff,

v.

HONORABLE BRUCE E. BABBITT

Defendant.

JUDGMENT

* * *

XXXX **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED ADJUDGED that this Court having granting Defendant's motion for summary judgment; Plaintiff take nothing. This complaint and action are hereby dismissed.

DATED at Phoenix, Arizona, this 29th day of June, 1999.

RICHARD H. WEARE
DCE/Clerk of Court

By: [illegible]
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 29, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-16927
D.C. No. CV-95-02640-JWS

MOHAVE VALLEY IRRIGATION &
DRAINAGE DISTRICT,

Plaintiff-Appellant,

v.

GALE A. NORTON, SECRETARY OF INTERIOR,

Defendant-Appellee.

ORDER

Before:
SCHROEDER, Chief Judge, WALLACE, and TALLMAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX D — BOULDER CANYON PROJECT ACT, 43 U.S.C. §§ 617, 617d, 617e AND 617g(a)

Sec. 617. Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain

For the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior subject to the terms of the Colorado River compact hereinafter mentioned in this chapter, is authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and

Coachella Valleys: Provided, however, That no charge shall be made for water for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, and other property necessary for said purposes.

* * *

Sec. 617d. Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

The Secretary of the Interior is authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this subchapter, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this subchapter and the payments to the United States under subsection (b) of section 617c of

this title. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to subsection (a) of section 617c of this title. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

* * *

Sec. 617e. Uses to be made of dam and reservoir; title in whom; leases, regulations; limitation on authority

The dam and reservoir provided for by section 617 of this title shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: Provided, however, That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 617d of this title relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under the contracts for sale of electrical energy, shall apply.

* * *

Appendix D

Sec. 617g. Colorado River compact as controlling authority in construction and maintenance of dam, reservoir, canals, and other works

(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein, authorized shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this subchapter to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

* * * *

APPENDIX E — CONTRACT FOR DELIVERY OF WATER BETWEEN UNITED STATES DEPARTMENT OF THE INTERIOR AND THE STATE OF ARIZONA (ARIZ. REV. STAT. § 45-1301)

45-1301. Ratification of Lake Mead contract

There is hereby unconditionally ratified, approved and confirmed, that certain contract for the storage and delivery of water from Lake Mead executed on behalf of the United States by the honorable Harold L. Ickes, secretary of the interior, and on behalf of the state of Arizona by its Colorado river commission, bearing date the 9th day of February, 1944, as follows:

UNITED STATES DEPARTMENT
OF THE INTERIOR

Bureau of Reclamation

BOULDER CANYON PROJECT

Arizona-California-Nevada

CONTRACT FOR DELIVERY OF WATER

THIS CONTRACT made this 9th day of February, 1944, pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplemental thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon project act, and acts amendatory thereof or supplementary thereto, between THE

Appendix E

UNITED STATES OF AMERICA, hereinafter referred to as "United States," acting for this purpose by Harold L. Ickes, secretary of the interior, hereinafter referred to as the "secretary," and the STATE OF ARIZONA, hereinafter referred to as "Arizona," acting for this purpose by the Colorado river commission of Arizona, pursuant to chapter 46 of the 1939 session laws of Arizona,

WITNESSETH THAT:

EXPLANATORY RECITALS

2. WHEREAS, for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary acting under and in pursuance of the provisions of the Colorado River Compact and Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead of a capacity of about thirty-two million (32,000,000) acre-feet, and

3. WHEREAS, said Boulder Canyon Project Act provides that the Secretary under such general rules and regulations, as he may prescribe, may contract for the storage of water in the reservoir created by Boulder Dam, and for the delivery of such water at such points on the river as may be agreed

upon, for irrigation and domestic uses, and provides further that no person shall have or be entitled to have the use for any purpose of the water stored, as aforesaid, except by contract made as stated in said Act, and

4. WHEREAS, it is the desire of the parties to this contract to contract for the storage of water and the delivery thereof for irrigation of lands and domestic uses within Arizona, and

5. WHEREAS, nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes,

6. NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER

7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver and Arizona, or agencies or water users therein, will accept under this contract each calendar year from storage in Lake Mead, at a point or points of diversion on the Colorado River approved by the Secretary, so much water as may be necessary for the beneficial consumptive use for irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet.

(b) The United States also shall deliver from storage in Lake Mead for use in Arizona, at a point or points of diversion on

the Colorado River approved by the Secretary, for the uses set forth in subdivision (a) of this Article, one-half of any excess or surplus waters unapportioned by the Colorado River Compact to the extent such water is available for use in Arizona under said compact and said act, less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article.

(c) This contract is subject to the condition that Boulder Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the United States and Arizona, and agencies and water users therein, shall observe and be subject to and controlled by said Colorado River Compact and the Boulder Canyon Project Act in the construction, management, and operation of Boulder Dam, Lake Mead, canals and other works, and the storage, diversion, delivery and use of water for the generation of power, irrigation and other uses.

(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

(e) This contract is for permanent service, subject to the conditions stated in subdivision (c) of this Article, but as to the one-half of the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c) of Article III of the Colorado River Compact, such water is subject to further equitable apportionment at any time after October 1, 1963, as provided in Article III(f) and Article III(g) of the Colorado River Compact.

(f) Arizona recognizes the right of the United States and the State of Nevada to contract for the delivery from storage in Lake Mead for annual beneficial consumptive use within Nevada for agricultural and domestic uses of 300,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact, and in addition thereto to make contract for like use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963 as provided in Article III(f) and Article III(g) of the Colorado River Compact.

(g) Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact, and nothing contained in this contract shall prejudice such rights.

(h) Arizona recognizes the right of the United States and agencies of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate

of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

(i) Nothing in this contract shall preclude the parties hereto from contracting for storage and delivery above Lake Mead of water herein contracted for, when and if authorized by law.

(j) As far as reasonable diligence will permit, the water provided for in this contract shall be delivered as ordered and as reasonably required for domestic and irrigation uses within Arizona. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered, for the purpose of investigation and inspection, maintenance, repairs, replacements or installation of equipment or machinery at Boulder Dam, or other dams heretofore or hereafter to be constructed, but so far as feasible will give reasonable notice in advance of such temporary discontinuance or reduction.

(k) The United States, its officers, agents and employees shall not be liable for damages when for any reason whatsoever suspensions or reductions in the delivery of water occur.

(l) Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations

or political subdivisions therein of Arizona as may contract therefor with the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract.

(m) Rights-of-way across public lands necessary or convenient for canals to facilitate the full utilization in Arizona of the water herein agreed to be delivered will be granted by the Secretary subject to applicable federal statutes.

POINTS OF DIVERSION: MEASUREMENTS OF WATER

8. The water to be delivered under this contract shall be measured at the points of diversion, or elsewhere as the Secretary may designate (with suitable adjustment for losses between said points of diversion and measurement), by measuring and controlling devices or automatic gauges approved by the Secretary, which devices, however, shall be furnished, installed, and maintained by Arizona, or the users of water therein in a manner satisfactory to the Secretary; said measuring and controlling devices or automatic gauges shall be subject to the inspection of the United States, whose authorized representatives may at all times have access to them, and any deficiencies found shall be promptly corrected by the users thereof. The United States

shall be under obligation to deliver water only at diversion points where measuring and controlling devices or automatic gauges are maintained, in accordance with this contract, but in the event diversions are made at points where such devices are not maintained, the Secretary shall estimate the quantity of such diversions and his determination thereof shall be final.

CHARGES FOR STORAGE AND DELIVERY OF WATER

9. No charge shall be made for the storage or delivery of water at diversion points as herein provided necessary to supply present perfected rights in Arizona. A charge of 50¢ per acre-foot shall be made for all water actually diverted directly from Lake Mead during the Boulder Dam cost repayment period, which said charge shall be paid by the users of such water, subject to reduction by the Secretary in the amount of the charge if it is concluded by him at any time during said cost-repayment period that such charge is too high. After expiration of the cost-repayment period, charges shall be on such basis as may hereafter be prescribed by Congress. Charges for the storage or delivery of water diverted at a point or points below Boulder Dam, for users, other than those specified above, shall be as agreed upon between the Secretary and such users at the time of execution of contracts therefor, and shall be paid by such users; provided such charges shall, in no event, exceed 25¢ per acre-foot.

RESERVATIONS

10. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the

users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III(a) of the Colorado River Compact; (3) what part, if any, is within Article III(b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III(a) of the Colorado River Compact between the Upper Basin and the Lower Basin.

DISPUTES AND DISAGREEMENTS

11. Whenever a controversy arises out of this contract, and if the parties hereto then agree to submit the matter to arbitration, Arizona shall name one arbitrator and the Secretary shall name one arbitrator and the two arbitrators thus chosen shall meet within ten days after their selection and shall elect one other arbitrator within fifteen days after their first meeting, but in the event of their failure to name the third arbitrator within thirty days after their first meeting, such arbitrator not so selected shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Tenth Circuit. The decision of any two of the three arbitrators thus chosen shall be a valid and binding award.

Appendix E

RULES AND REGULATIONS

12. The Secretary may prescribe and enforce rules and regulations governing the delivery and diversion of waters hereunder, but such rules and regulations shall be promulgated, modified, revised or extended from time to time only after notice to the State of Arizona and opportunity is given to it to be heard. Arizona agrees for itself, its agencies and water users that in the operation and maintenance of the works for diversion and use of the water to be delivered hereunder, all such rules and regulations will be fully adhered to.

AGREEMENT SUBJECT TO COLORADO RIVER COMPACT

13. This contract is made upon the express condition and with the express covenant that all rights of Arizona, its agencies and water users, to waters of the Colorado River and its tributaries, and the use of the same, shall be subject to and controlled by the Colorado River Compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to the Act of Congress approved August 19, 1921 (42 Stat. 171), as approved by the Boulder Canyon Project Act.

EFFECTIVE DATE OF CONTRACT

14. This contract shall be of no effect unless it is unconditionally ratified by an Act of the Legislature of Arizona, within three years from the date hereof, and further, unless within three years from the date hereof the Colorado River Compact is unconditionally ratified by Arizona. When both ratifications are effective, this contract shall be effective.

Appendix E

INTEREST IN CONTRACT NOT TRANSFERABLE

15. No interest in or under this contract, except as provided by Article 7(l), shall be transferable by either party without the written consent of the other.

APPROPRIATION CLAUSE

16. The performance of this contract by the United States is contingent upon Congress making the necessary appropriations for expenditures for the completion and the operation and maintenance of any dams, power plants or other works necessary to the carrying out of this contract, or upon the necessary allotments being made therefor by any authorized federal agency. No liability shall accrue against the United States, its officers, agents or employees by reason of the failure of Congress to make any such appropriations or of any federal agency to make such allotments.

MEMBER OF CONGRESS CLAUSE

17. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

DEFINITIONS

18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract.

Appendix E

19. IN WITNESS WHEREOF, the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA

By (s) Harold L. Ickes Secretary of the Interior

STATE OF ARIZONA, acting by and through its COLORADO RIVER COMMISSION

By (s) Henry S. Wright, Chairman

By (s) Nellie T. Bush, Secretary

Approved this 11th day of Feb., 1944

(s) Sidney P. Osborn Governor of the State of Arizona

APPENDIX F — FINAL DECISION OF THE UNITED STATES DEPARTMENT OF THE INTERIOR DATED APRIL 3, 1996

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

APR 03 1996

CERTIFIED – RETURN RECEIPT REQUESTED

Mr. R. D. Johnson
General Manager
Mohave Valley Irrigation and
Drainage District
P.O. Box 5813
Mohave Valley, Arizona 86440

Dear Mr. Johnson:

By letter dated August 18, 1994, your attorney, Mr. Terrence S. Leek, appealed the Lower Colorado Region's determination dated June 1, 1994, signed by Mr. Robert W. Johnson, Regional Director. The determination stated that MVIDD's contract entitlement of up to 41,000 acre-feet of Colorado River pursuant to Contract No. 14-06-W-204 is subject to the Present Perfected Rights (PPR) entitlements located within MVIDD's contract service area.

In response to your appeal, this office requested the Department of the Interior's Office of the Solicitor to analyze MVIDD's contract and the relevant Law of the River. By memorandum dated February 21, 1996 (copy enclosed), the

Appendix F

Assistant Solicitor, Branch of Water & Power Division of Land and Water provided this office the requested analysis.

This office has reviewed the analysis and concurs with the Regional Director's determination that the PPRs within MVIDD's contract service area were subsumed into the MVIDD contract. This letter constitutes the final decision of the Department of the Interior on this matter.

Accordingly, the diversion of Colorado River water by well or from the river for use by PPR holders or MVIDD for use within MVIDD's contract service area will be charged against and limited to MVIDD's contract water entitlement. The PPR holders whose lands are located within MVIDD's contract service area who have a contract with the United States have a superior right over MVIDD's contractual entitlement to Colorado River water. In any year that such PPR holders do not schedule and fully use their PPR water entitlements, MVIDD, by virtue of its contract, may schedule and use the unused portion of the PPR contract entitlements, providing the Colorado River water use within MVIDD's contract service area does not exceed MVIDD's contract entitlement.

Pursuant to the Law of the River, the Secretary of the Interior is required to provide qualified PPR applicants water delivery contracts. For PPR contracts for lands within the MVIDD contract service area, the PPR contracting process would include consultation with MVIDD and a copy of each executed PPR contract would be provided to MVIDD. Reclamation has received several requests for contracts from PPR holders within MVIDD and executed one contract for

the PPR which has the identification name "Hurschler" on March 20, 1984.

If you have any questions concerning this matter, please contact Mr. Bill Martin of the Lower Colorado Regional Office at (702) 293-8652.

Sincerely,

s/ Eluid L. Martinez
Eluid L. Martinez
For Commissioner

Enclosure

cc: Honorable Jon L. Kyl
United States Senate
Washington, D.C. 20510

Honorable Bob Stump
House of Representatives
Washington, D.C. 20515

Mr. Terrence S. Leek
Attorney, Leek & Sutherland
126 North Marina
Prescott, Arizona 86301

Mr. William H. Allen
ASL Hydrologic & Environmental Services
1130 East Missouri Avenue, Suite 110
Phoenix, Arizona 85014
(w/cy of encls to ea)

Appendix F

Honorable John McCain
United States Senate
Washington, D.C. 20510

Ms. Rita Pearson, Director
Arizona Department of Water Resources
500 North 3rd Street
Phoenix, Arizona 85004-3903